Supreme Court, U.S.
FILED
SEP 25 1998
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No. 98-337

In The

Supreme Court of the United States

October Term, 1997

PNEUMO ABEX CORPORATION, *et al.*,

Petitioners,

vs.

HIGH POINT, THOMASVILLE and DENTON RAILROAD COMPANY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented for review is:

Whether, given all of the facts surrounding the Railroads' sales of used wheel bearings to Pneumo Abex Corporation ("Abex") for use in their entirety as raw materials in the manufacture of finished products, the Fourth Circuit correctly ruled that the transactions between Abex and the Railroads were not arrangements for treatment or disposal under Section 107(a)(3) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(3) (1994).[1]

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1. For convenience, all references to CERCLA hereinafter will be to the statutory section numbers rather than the United States Code Section numbers.

STATEMENT PURSUANT TO RULE 29.6

The parent corporation of CSX Transportation, Inc. is CSX Corporation. The nonwholly owned subsidiaries of CSX Transportation, Inc. are The Akron Union Passenger Depot Company, Augusta and Summerville Railroad Company, Beaver Street Tower Company, Belt Railway Company of Chicago, Central Transfer Railway and Storage Company, Chatham Terminal Company, Four Rivers Transportation, Inc., The Lakefront Dock and Railroad Terminal Company, Midland United Corporation, Norfolk and Portsmouth Belt Line Railroad Company, North Charleston Terminal Company, Terminal Railroad Association of St. Louis, The Tylerdale Connecting Railroad Company, Winston-Salem Southbound Railway Company, Woodstock & Blocton Railway Company. The parent corporation of Fruit Growers Express Company, Inc. is Rail Wagons, Inc.; it has no subsidiaries. High Point, Thomasville & Denton Railroad Company is a wholly owned subsidiary of Winston-Salem Southbound Railway Company; it has no subsidiaries. Norfolk Southern Corporation is the parent company of Norfolk Southern Railway Company. The nonwholly owned subsidiaries of Norfolk-Southern Railway Company are High Point, Randleman, Asheboro and Southern Railroad Company, Mobile and Birmingham Railroad Company, Norfolk and Portsmouth Belt Line Railroad Company, The North Carolina Midland Railroad Company. The South Western Railroad Company, State University Railroad Company and Yadkin Railroad Company. Norfolk and Western Railway Company was merged into Norfolk Southern Railway Company as of September 1, 1998.

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APPENDIX

Appendix A — Excerpts From Oral Argument Before The United States Court Of Appeals For The Fourth Circuit Dated January 27, 1998 ..... 1a

COUNTER-STATEMENT OF THE CASE

Petitioners (hereinafter "Site Owners") claim that this case is about contamination from "lead and other metals from scrap metal sent to the site by the respondent railroads for processing."[1] Site Owners Petition ("Petition") at 1. The Railroads did not send scrap to Pneumo Abex Corporation ("Abex") for processing; the Railroads[2] sold worn bearings to Abex which Abex then used in their entirety as valuable substitutes for virgin raw metals in its manufacturing operations. App. 16. Moreover, the pollution from Abex's Foundry would have been no different had Abex used only virgin raw materials and not the worn bearings. *Id.*

This case thus presents the question of whether a manufacturer can force its suppliers of raw materials, worn wheel bearings removed from railroad freight cars in this case, to bear the costs of cleaning up contamination from its manufacturing operations by alleging that the sales were an arrangement for treatment or disposal under Section 107(a)(3) of CERCLA. Congress defined "treatment" and "disposal" in Section 107(a)(3) by borrowing their meaning from their definitions in the Solid Waste Disposal Act ("SWDA"),

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1. Moreover, Site Owners mistakenly assert that the Site is contaminated by lead and other metals from only the Foundry. In fact the Foundry's operations were just one of several sources of contamination at the site. App. 60. It was for precisely this reason that the court of appeals remanded this case to the lower court for a determination of the appropriate, relative shares for all Site Owners. App. 16-17.

2. The Railroads are CSX Transportation, Inc., Fruit Growers Express Company, Inc., High Point, Thomasville & Denton Railroad Company and Norfolk Southern Railway Company. As of September 1, 1998, Norfolk and Western Railway Company was merged into Norfolk Southern Railway Company.

42 U.S.C. § 6901 *et seq.*, which encompass only activities involving wastes. Based on the definitions for those terms, the Fourth Circuit correctly ruled, as did the Sixth, Seventh, Ninth and Eleventh Circuits before it, that Section 107(a)(3) presupposes that the materials are wastes so that a discard, rather than the sale of a valuable material for a productive use, must have occurred before arranger liability is appropriate. After closely analyzing the facts of this case, the Fourth Circuit correctly determined that the worn bearings were useful and valuable raw materials, not wastes, and then correctly ruled that the sales of the worn bearings to Abex were not arrangements for treatment or disposal under Section 107(a)(3).

The Fourth Circuit's decision merely identified one fairly unique set of factual circumstances in which arranger liability did not reach the reuse of secondary materials. The decision cannot reasonably be read to protect or exempt all recycling or every reuse of secondary materials from arranger liability, or to exclude all recyclables from the concept of discard. Rather, the only legitimate question for any appeal to this Court is whether the Fourth Circuit correctly ruled that arranger liability did not reach the sales of the worn bearings to Abex based on the facts presented.

A. Counter-Statement of Proceedings Below

Site Owners brought this action in the United States District Court for the Eastern District of Virginia seeking the imposition of joint and several liability or, in the alternative, a right of contribution against the defendants, including the Railroads. Jurisdiction in the district court was based on Section 107(a), 42 U.S.C. § 9607(a) and Section 113(b), 42 U.S.C. § 9613(b). App. 19. On cross-motions for summary judgment, the district court held the defendants, including the Railroads, liable as arrangers for treatment and disposal of hazardous substances

under Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607. App. 48. The district court also ruled that Site Owners, despite themselves being liable under CERCLA, had standing to maintain an action under Section 107(a) of CERCLA.[3] App. 44.

In ruling on the cross-motions for summary judgment, the district court rejected the Railroads' argument that the terms used by Congress in defining arranger liability required the court to first "find that the hazardous substance was a solid waste." App. 37. In addition, although Site Owners alleged that the Railroads had sold worn bearings to the Foundry for roughly fifty years, the district court found, without explanation, that the worn bearings were not useful products because "the Railroad Defendants and others were not sellers of reclaimed material." App. 33-34. The district court also found that other decisions extending the concept of useful products to secondary materials did not "effectuate CERCLA's goals in aggressively addressing the release or threatened release of hazardous substances." App. 34. Moreover, despite undisputed evidence that the worn bearings were traded in an active metals market, the district court nevertheless concluded that the Railroads "perhaps were fortunate to find a buyer for the bearings." App. 33.

In describing the Fourth Circuit's decision, however, Site Owners omit a critical fact relied on by the court of appeals in reversing the district court—that the contamination alleged to have been caused by using the worn bearings would have been "produced even if virgin materials were used to make the new

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3. In so ruling, the district court stated that it found the reasoning of four circuit court opinions to the contrary unpersuasive, App. 41-42, and thus allowed Site Owners to pursue their claims against the defendants, including the Railroads, under Section 107(a). App. 43.

bearings." App. 15. Moreover, the court of appeals also reversed the ruling allowing the Site Owners to proceed under Section 107. App. 17-18. It thus joined in the consensus among the courts of appeals denying standing under Section 107(a) to parties themselves liable under CERCLA.[4] *Id.*

Following the ruling by the court of appeals, Site Owners filed a Petition for Rehearing and a Suggestion for Rehearing en banc ("Rehearing Petition"). App. 110. This Rehearing Petition presented essentially the same arguments as the Petition to this Court, except that Site Owners also argued that the ruling was inconsistent with an earlier decision from the Fourth Circuit, *Owen Elec. Steel Co. v. Browner*, 37 F.3d 146 (4th Cir. 1994). Even though Chief Judge Wilkinson and Judge Hamilton, who were on the panel that decided the *Owen Elec.* case, received Site Owners' Rehearing Petition, neither they nor any other member of the Court even requested a vote on the petition. App. 110.

Moreover, Site Owners incorrectly state that the Environmental Protection Agency ("EPA") has designated the Railroads as liable parties. Rather, the Agency's administrative order merely describes the Railroads as "potentially responsible parties," App. 143–146, and as such they retain their statutory rights to contest their alleged liability. The earlier correspondence from EPA similarly characterizes the Railroads. Finally, the Department of Justice has reached no conclusions regarding the decision by the Fourth Circuit despite the statements by Site Owners to the contrary. App. 199.

B. Counter-Statement of Facts

Site Owners' recitation omits many crucial facts that persuaded the Fourth Circuit that the worn bearings were

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4. Site Owners have not asked this Court to review that ruling.

valuable raw materials, not discarded materials. Most importantly, the Site Owners fail to explain that the pollution from Abex's Foundry would have happened even if Abex had used only virgin metals for its manufacturing feedstock. App. 15. Likewise, they fail to note that Abex considered the worn bearings to be as valuable to its operations as virgin raw materials, which the following concession at oral argument makes clear:

> Court: Let me go down a side road for just a minute. One man's scrap is another man's gold, and this scrap is at least as valuable to the process as raw materials are; is that correct? And yet the raw materials could in no wise be considered scrap by anybody.
>
> Mr. Homsy: That's correct.

App. 3a. While Site Owners now seek to characterize the operations at Abex's Foundry as reclamation, a regulatory term of art limited to separating reusable components of a discarded material from the waste portion,[5] that assertion is clearly incorrect since Abex reused the worn bearings in their entirety as raw materials.

Nor have Site Owners mentioned other facts that influenced the Fourth Circuit's determination that the worn bearings were valuable products and not wastes. App. 16. For instance, both Abex and the Railroads intended that "the wheel bearings would be reused in their entirety in the creation of new bearings." *Id.* Because of that, Abex "paid the [Railroads] for the bearings" and not the other way around. *Id.* The court of appeals also

5. EPA's examples of reclamation activities include the recovery of lead plates from spent batteries and the recovery of reusable solvents from spent solvents. 40 C.F.R. § 261.1(c)(4).

found, not surprisingly, that both parties to the transactions believed that "the bearings were a valuable product for which [Abex] paid a competitive price." *Id.* For instance, Abex so feared that its employees might steal the worn bearings that it measured the height of the bumpers of their cars as they came and went at the beginning and end of each day. Railroads' Appellants' Brief to Fourth Circuit ("RR. Br.") at 6. Further, no portion of any worn bearing was ever thrown out. *Id.*

While omitting these important facts, Site Owners have misstated the purpose of the initial stage of Abex's manufacturing process and the handling of the materials collected from it. The worn bearings had two components: a bronze back and a liner made of a leaded alloy. RR. Br. at 6. Abex was so concerned about maintaining the specified metal composition of these two components that the first step in its process separated the liner materials from the bearing back to facilitate the reuse of these two valuable, yet distinct alloys. Railroads' Reply Brief to Fourth Circuit ("Rep. Br.") at 3. Any dirt or grease removed from the bearing was incidental to that activity.[6] App. 15. Moreover, removing impurities was not the object of this process because impurities exist in all metal and are an unavoidable consequence when melting metal. Rep. Br. at 3. In any event, once separated, both alloys were reused in their entirety.

SUMMARY OF ARGUMENT

The Court should deny Site Owners' Petition because this case does not satisfy any of the normal criteria for this Court's review. First, the court of appeals applied the same discard of waste versus sale of a valuable material legal standard used by

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6. Site Owners have conceded that this dirt and grease did not contribute to the contamination at the Site. App. 1a-3a. In any event, these materials were shipped off-site. Rep. Br. at 3.

every other court of appeals construing arranger liability under Section 107(a)(3) of CERCLA. Moreover, like these other courts, the Fourth Circuit made its determination that the worn bearings had been sold as valuable products based on all of the facts concerning the nature of the bearings and the manner of their use by Abex.

Second, the Fourth Circuit's analysis of whether the worn bearings had been discarded when sold to serve as raw materials is consistent with the decisions by other courts of appeals and EPA's own regulations. Rather than undermining the federal scheme for protecting the environment, the Fourth Circuit's decision integrates arranger liability under CERCLA with EPA's regulatory concept for discard by imposing a common limit on their application to secondary materials, like the worn bearings here, which have the functionality and value of raw materials. Thus, despite Site Owners' many misstatements to the contrary, there is no conflict among the circuits or any issue of national importance arising from the Fourth Circuit's ruling.

Site Owners' Petition reflects nothing more than their disagreement with the court of appeals' conclusion after applying a properly stated rule of law to undisputed facts. Nowhere in their Petition have they challenged the Fourth Circuit's essential factual findings that (i) the parties intended that the worn bearings would be used by Abex in their entirety as raw materials, (ii) the contamination from Abex's Foundry would have been no different had it used only virgin raw materials, or (iii) the worn bearings were valuable to both Railroads and Abex and that Abex paid a competitive price for them. These critical—and undisputed—facts show that the worn bearings were sold to serve a valuable and productive purpose as raw materials, and that they could not be considered discarded materials. These unique facts also demonstrate that the Fourth Circuit's decision has limited application and does not raise any issues of national importance.

For these reasons, the Railroads respectfully pray that the Court deny the Petition.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER COURT OF APPEALS.

A. The Fourth Circuit Used the Same Standard As All Four Circuits That Have Construed Arranger Liability under Section 107(a)(3).

Site Owners contend that the Fourth Circuit did not follow the standard adopted by other circuits for arranger liability under Section 107(a)(3) of CERCLA. The standard objected to by Site Owners was stated clearly in the Fourth Circuit's opinion:

> In determining whether a transaction was for the *discard of hazardous substances* [which creates liability under CERCLA] or for the *sale of valuable materials* [which does not create liability under CERCLA], courts focus on several factors. . . . However, "there is no bright line between a *sale* and a *disposal* under CERCLA. A party's responsibility . . . must by necessity turn on a fact-specific inquiry into the nature of the transaction."

App. 14 (citations omitted) (emphasis added). Four other circuit courts, the Sixth, Seventh, Ninth, and Eleventh have applied the same discard of wastes versus sale of valuable materials standard to arranger liability claims:

> The question remains whether *in light of all the circumstances* the transaction involved an arrangement for disposal or treatment of a hazardous *waste*.

Cadillac Fairview/California, Inc. v. United States, 41 F.3d 562, 566 (9th Cir. 1994) (emphasis added).

> [C]ourts in other circuits have construed "disposal" for purposes of section 107(a)(3) as referring only to an affirmative act of *discarding a substance as waste*, and not to the *productive use* of the substance.

3550 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d 1355, 1362 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991) (emphasis added).

> Our review of the record reveals that Pepper's and FP & L have not met their burden of demonstrating that the transaction involved anything more than a *mere sale* . . . . Nothing in the record supports an inference that the manufacturers arranged for the *disposal of hazardous waste*.

Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1319 (11th Cir. 1990) (emphasis added).

> [I]t has been held that no arrangement for *disposal of hazardous wastes* has taken place where there has been a *conveyance of a "useful, albeit dangerous product,* to serve a particular, intended purpose."

AM Int'l, Inc. v. International Forging Equip. Corp., 982 F.2d 989, 999 (6th Cir. 1993) (citations omitted) (emphasis added).

> [T]he *sale of a product* which contains a hazardous substance cannot be equated to the *disposal of the substance* itself or even the making of arrangements for its subsequent disposal. . . .

G. J. Leasing Co. v. Union Elec. Co., 54 F.3d 379, 384 (7th Cir. 1995) (emphasis added). Even recently, the Ninth Circuit reaffirmed this standard for arranger liability under Section 107(a)(3):

> Thus, A&W disposed of or treated the ore only if it was waste. If the ore was a useful product, then it was not a waste and not subject to CERCLA.

A&W Smelter & Refiners v. Clinton, 146 F.3d 1107, 1112 (9th Cir. 1998) (citations omitted). These decisions show that the Fourth Circuit applied the same correct legal standard as all four other circuits addressing Section 107(a)(3).[7] Moreover, like the Fourth Circuit, all of these courts evaluated the totality of the facts to differentiate between a discard of wastes and the sale of a valuable product. *See, e.g., Florida Power & Light*, 893 F.2d at 1317 ("Whether an 'arrangement for' disposal exists depends on the facts of each case."); *United States v. Cello-Foil Prods. Inc.*, 100 F.3d 1227, 1234 n.6 (6th Cir. 1996) ("it is important to reiterate that whether an arrangement has been made is an issue to be determined from the totality of the circumstances."); *G.J. Leasing*, 54 F.3d at 385 (considering nature of material at time of sale, primary purpose for transaction and the likely effect); *Cadillac Fairview*, 41 F.3d at 565 ("the question is whether the fact-finder could infer *from*

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7. As these cases show, the terms "useful product", "valuable material" or "valuable product" are applied somewhat interchangeably, but the courts' fundamental inquiry has consistently examined whether the materials are being sold for a productive purpose as opposed to a discard.

all the circumstances that 'a transaction in fact involved an arrangement for the disposal [or treatment] of a hazardous substance.' ") (emphasis added); *A&W Smelter*, 146 F.3d at 1113 (considering utility of materials, parties' actions, and commercial reality including the materials' market value).

B. Site Owners Misstate the Accepted Standard for Arranger Liability under Section 107(a)(3).

Without even mentioning this uniform interpretation of Section 107(a)(3) by four courts of appeals, Site Owners misstate the inquiry under Section 107(a)(3) as being whether the materials are "unfit for their original purpose" at the time of the transaction. Petition at i. Site Owners' proposed standard distorts the discard of waste versus valuable material standard by selectively elevating one relevant fact into a bright-line rule. The cases themselves show that the sale of something no longer useful for its original purpose is not the sole determinant of whether the transaction is a discard of waste or the sale of a valuable product as Site Owners contend.

For example, in *G.J. Leasing*, the Seventh Circuit held that CERCLA did not reach the sale of a decommissioned power plant even though the plant was no longer useful for its original purpose of generating electricity. 54 F.3d at 385-86 (after substantial modifications the plant was useful for the new purpose of storing grain). Other courts have extended the valuable material concept to lead plates removed from spent batteries, *Douglas County v. Gould, Inc.*, 871 F. Supp. 1242 (D. Neb. 1994), and to fly-ash, a by-product of coal combustion, used as an ingredient in manufacturing road base. *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346 (N.D. Ill. 1992). These holdings show the fallacy in Site Owners' contention that the only productive use of a material is its original, intended use. A secondary material's original purpose

is but one fact in the waste versus valuable material determination, and no court of appeals has established it as the sole criteria. Standing alone, this fact is inadequate for ascertaining whether a transaction is a discard of wastes.

Had Congress intended for CERCLA to apply to all transactions in hazardous substances where the product was no longer useful for its original purpose, it could have said so. But as the Fourth Circuit explained, CERCLA's language requires courts to apply that statute to only those transactions involving the discard of wastes:

> [A]ppellees read the statute too broadly. Section 9601 of CERCLA states, "The term[ ] 'treatment' shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. § 6903]." 42 U.S.C. § 9601(29). The Solid Waste Disposal Act (SWDA) definition of "treatment" presupposes discard. . . . Had the authors of CERCLA intended not to adopt the presupposition of SWDA, they were certainly capable of defining "treatment" otherwise. However, as the legislature chose to use the SWDA definition of treatment, and the presupposition inherent in the definition, it is not the role of this court to substitute another definition.

App. 13. The Ninth Circuit held similarly:

> Stevens Creek argues that the specific reference to "disposal of hazardous substances" in section 107 overrides the definition of "disposal" limited to "hazardous wastes" borrowed from the Solid Waste Disposal Act. . . . Stevens Creek points to no authority construing "disposal" as it suggests. However courts in other circuits have construed

> "disposal" for purposes of Section 107(a)(3) as referring only to an *affirmative act* of *discarding* a substance as *waste*, and not to the *productive use* of the substance.

Stevens Creek, 915 F.2d at 1362 (emphasis added). By proposing a standard that would impose arranger liability on a secondary material, regardless of whether it is a waste, Site Owners would expand the reach of Section 107(a)(3) beyond the limitations imposed by Congress.

C. The Fourth Circuit's Decision Does Not Conflict with *Chevron*.

Site Owners' contentions that the Fourth Circuit's decision conflicts with this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Petition at 11, are similarly without basis. First, the Fourth Circuit can hardly be faulted for failing to mention *Chevron* because Site Owners failed to cite the decision in their brief to the court of appeals. As this issue was neither raised before nor addressed by the Fourth Circuit, this Court should follow its "normal practice . . . [which] is to refrain from addressing issues not raised in the Court of Appeals." *EEOC v. FLRA*, 476 U.S. 19, 24 (1986).

Second, *Chevron* applies only if Congress has not spoken on the issue. *Chevron*, 467 U.S. 842–43. As this Court explained there, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Courts have found that the language of Section 107(a)(3) unambiguously expresses the intent of Congress that CERCLA reaches only those transactions involving a discard of wastes. *See, e.g., Stevens Creek*, 915 F.2d at 1362. Moreover, courts

have also held that the term "discard" as used in the SWDA definition of waste is itself unambiguous, having been used by Congress in its "ordinary sense—'disposed' of or 'abandoned'." *Owen Elec. Steel Co. v. Browner*, 37 F.3d 146, 149 (4th Cir. 1994) (*quoting American Mining Congress v. United States EPA*, 824 F.2d 1177, 1185 (D.C. Cir. 1987) ("*AMC I*")). Since Congress intended "discarded" to have its ordinary meaning,[8] the Fourth Circuit was correct in not unearthing *Chevron* and in finding that "as the legislature chose to use the SWDA definition of treatment, and the presupposition inherent in the definition, it is not the role of this court to substitute another definition." App. 13–14.

Finally, even if Section 107(a)(3) were ambiguous, EPA's long-standing interpretation of discard and its regulatory program for hazardous waste management are entirely consistent with the Fourth Circuit's holding that the worn bearings were not discarded.[9] Site Owners can only argue to

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8. Site Owners erroneously claim that the term discard requires a "science-based" determination by EPA. Petition at 14. The seminal decision from the District of Columbia Circuit, *American Mining Congress v. United States*, 824 F.2d 1177 (D.C. Cir. 1987), which Site Owners do not even reference, rejected this very argument by EPA:

> It bears noting that the term "discarded" is neither inherently difficult to define nor is so intimately tied to the knowledge of the industry and practicalities of regulation that definition requires agency expertise.

824 F.2d 1177, 1184 n.7.

9. By "EPA's long-standing interpretation", we do not mean to say that EPA has adopted a definition for discard other than its ordinary meaning. Rather, we wish to make the point that EPA has adopted regulations applying this meaning of discard to different situations. These regulations are entirely consistent with the Fourth Circuit's decision.

the contrary by misstating both EPA's long-standing interpretation of discard and the implementing regulations.

The Site Owners erroneously contend that EPA has long interpreted discard to encompass all secondary materials "unless [they are] retained by the generating industry for immediate reuse in a continuous process." Petition at p. 12. Actually, in interpreting the term "discard," EPA has consistently examined whether the secondary materials function as raw materials:

> When secondary materials are directly used (or, in the case of previously used materials, reused) in these ways, we stated, they function as raw materials in normal manufacturing operations or as products in normal commercial applications. We reiterate these positions in the final regulation.

50 Fed. Reg. 614, 637 (January 4, 1985) (Final Rule).[10] EPA's waste regulations implement this limitation on the concept of discard by excluding secondary materials used as raw materials:

> *Materials that are not solid waste when recycled.* (1) Materials are not solid wastes when they can be shown to be recycled by being:
>
> (i) Used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or
>
> (ii) Used or reused as effective substitutes for commercial products;

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10. EPA interpreted discard in this manner as early as 1983. 48 Fed. Reg. 14474, 14475 (April 4, 1983).

> (iii) Returned to the original process from which they are generated, without first being reclaimed.

40 C.F.R. § 261.2(e). As recently as 1996, EPA explained that these materials were not considered solid waste by EPA and consequently not discarded because they function as raw materials. 61 Fed. Reg. 2361 (January 25, 1996).

Had Site Owners accurately described EPA's long-standing interpretation of the term discard or discussed the RCRA regulations, it would have been clear that the decision by the Fourth Circuit is an entirely consistent interpretation. Although Site Owners repeatedly refer to the worn bearings as scrap, they have already conceded that the worn bearings were being reused as effective substitutes for virgin raw materials, App. 3a, which brings their reuse by Abex within both the letter and the spirit of EPA's regulations. *See* 40 C.F.R. § 261.2(e)(i) and (ii). Moreover, by analyzing the nature of the worn bearings, including their utility and value, and how they were used by Abex, the Fourth Circuit focused on the facts relevant to whether the worn bearings were discarded or productive, valuable materials. This is precisely the inquiry undertaken by EPA when promulgating its regulations under RCRA.[11]

D. The Fourth Circuit's Decision Does Not Conflict with the Decisions from the District of Columbia and Eleventh Circuits Considering the Term "Discarded" Under the SWDA Relied on by Site Owners.

Site Owners mistakenly claim that the *Pneumo Abex* decision also conflicts with circuit court decisions interpreting the term discard under a related statute, the SWDA, from which

11. EPA itself undertook this inquiry when it interpreted discard for regulatory purposes under RCRA. 48 Fed. Reg. 14474, 14475 (April 4, 1983).

the definitions of treatment and disposal under CERCLA are borrowed. Petition at 21-23. A decision from the Fourth Circuit not cited by Site Owners, *Owen Elec.*, best explains the inquiry undertaken by these courts:

> Congress was using the term "discarded" in its ordinary sense — "disposed of" or "abandoned" . . . [because] only materials that are "disposed of" or "abandoned" "become part of the waste disposal problem," with which the [SWDA] is concerned.

37 F.3d at 149 (quoting *AMC I*, 824 F.2d 1177, 1186). The District of Columbia Circuit, in *American Mining Congress v. United States EPA*, applied the same ordinary meaning test, stating that "[b]ecause such materials were never 'disposed of, abandoned, or thrown away,' we concluded, they were not 'discarded' within the meaning of [SWD]." 907 F.2d 1179, 1186 (D.C. Cir. 1990) (discussing *AMC I*) ("*AMC II*"); *see also American Petroleum Inst. v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990) ("Unlike the materials in question in *AMC I*, K061 is undisputably 'discarded' *before* being subject to metals reclamation.") (emphasis in original); *Shell Oil Co. v. EPA*, 950 F.2d 741, 756 (D.C. Cir. 1991) ("*AMC I* does not affect in any way the EPA's ability to regulate hazardous materials after they have been discarded").

As is clear, these cases do not adopt Site Owners' rigid standard for discard as the all-inclusive test for determining whether a secondary material has been discarded. Nor do the courts defer to EPA's interpretation of discard. In fact the District of Columbia Circuit rejected EPA's proposed application of the term discard in both *AMC I* and *AMC II*. *AMC I*, 824 F.2d 1177, 1193; *AMC II*, 907 F.2d 1179, 1186. They merely make clear that the immediate reuse of by-products in a manufacturing process is never a discard under the common,

ordinary meaning of that term. *AMC I*, 824 F.2d 1177, 1193. On this important point, the Site Owners have conceded the lack of conflict between the Fourth Circuit's decision and these cases by failing to argue that the worn bearings were discarded under the common, everyday meaning of that term. Thus, the Fourth Circuit's holding that the bearings had never been discarded as waste is consistent with the SWDA cases relied upon by Site Owners.

United States v. ILCO, Inc., another case cited by Site Owners, presents a completely inapposite discussion of the concept of discard. 996 F.2d 1126 (11th Cir. 1993). In *ILCO*, the lead plates at issue had been reclaimed from spent batteries, which EPA's regulations listed as discarded. *Id.* at 1131. The question before the court was whether the components of the spent batteries were no longer considered discarded after reclamation:

> It is unnecessary to read into the word "discarded" a congressional intent that the waste in question must finally and forever be discarded, as ILCO seems to argue. It is perfectly reasonable for EPA to assume Congress meant "discarded once."

Id. at 1132. In contrast, the bearings had never been discarded and accordingly were not part of the waste disposal problem.

It is also important to recognize that these cases were brought to the attention of the court of appeals in the parties' briefs. Here, the Fourth Circuit presumably chose not to discuss the SWDA cases because the court did not consider them to be important or relevant to the fact-specific inquiry at issue.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE FOURTH CIRCUIT'S DECISION WAS FACT DEPENDENT AND THUS DOES NOT PRESENT A QUESTION OF EXCEPTIONAL IMPORTANCE WARRANTING THIS COURT'S REVIEW.

A. The Outcome of the Fourth Circuit's Decision Was Dependent On A Set of Unique Factual Circumstances.

As the discard of waste versus sale of valuable material standard makes clear, liability under Section 107(a)(3) of CERCLA inevitably turns on a broad examination of the facts of the transaction at issue. *See, e.g., Cadillac Fairview*, 41 F.3d at 566 ("whether in light of all the circumstances the transaction involved an arrangement for disposal or treatment of a hazardous *waste*") (emphasis added). A reading of the Fourth Circuit's opinion makes clear that the court carefully considered the facts surrounding the transaction, including the nature of the worn bearings and the manner of their handling and use by Abex, before correctly concluding that no discard of waste occurred.

The first and most critical fact found by the Fourth Circuit was that the pollution from the Foundry "would [have] be[en] produced [by the Foundry] even if virgin materials were used to make the new bearings." App. 15. Thus, even if the Foundry had never purchased the worn bearings from the Railroads, and had instead purchased virgin metals, the pollution from the Foundry would have been no different. The worn bearings thus did not have a waste-like component being "treated" or removed by Abex which was accountable for the pollution from the Foundry. Again, this is in sharp contrast to the reclamation cases that Site Owners persist in trying to analogize to this case. *See infra* at 21-22.

The Fourth Circuit then recited four additional facts supporting its conclusion that the transactions were not a discard of wastes:

- The intent of both parties to the transaction was that the wheel bearings would be reused in their entirety in the creation of new wheel bearings. App. 16.

- [T]he appellants did not pay the Foundry to dispose of unwanted metal. *Id.*

- The parties contemplated that the bearings were a valuable product for which the Foundry paid a competitive price. *Id.*

- [T]he hazardous substance — the metals — were in a contained form when delivered for sale. *Id.*

Collectively, this unique set of facts distinguishes these transactions from all of Site Owners' cases. It also validates the Fourth Circuit's conclusion that the bearing transactions were the sale of valuable materials rather than the discard of wastes.

Site Owners claim that the Fourth Circuit erred in considering facts reflecting the "value" of the worn bearings and the "intent" of the parties concerning their use as raw materials by Abex. Yet, these are among the obvious facts to consider to determine whether a discard occurred under the ordinary meaning of that term endorsed by *AMC I*. Not surprisingly, they are part of the totality of circumstances examined by courts analyzing claims under Section 107(a)(3). *See A&W Smelter*, 146 F.3d at 1113. While value alone is not determinative of whether a material is a non-waste, it is certainly

a relevant and legitimate fact to be considered in any inquiry regarding a possible discard of materials. The parties' intent is also a relevant and probative fact because it gives effect to the statutory term "arranged for" and has been considered by other circuit courts. *See, e.g.*, *Amcast Indust. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 ("The words [arranged for] imply intentional action") (7th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994); *accord Am. Intern. v. Int'l. Forging Equip.*, 982 F.2d 989, 999 (6th Cir. 1993).

B. The Cases Relied Upon By Site Owners Involved Distinguishable Factual Circumstances.

Ultimately, Site Owners merely disagree with the Fourth Circuit over the conclusions to be drawn from the facts of this case. While the Fourth Circuit concluded that the wheel bearings were never discarded as wastes, the Site Owners insisted that they were. Such disagreements with the application of a correct legal standard to a particular set of facts are generally inadequate grounds for certiorari. Rule 10. Nonetheless, an analysis of the facts of the principal cases relied on by Site Owners shows that the facts of *Pneumo Abex* fall far from the types of transactions that have traditionally been regarded as a discard of waste.

As previously explained, the SWDA cases relied upon by Site Owners such as *AMC II*, 907 F.2d 1179, *American Petroleum Inst.*, 906 F.2d 729, and *ILCO*, 996 F.2d 1126, all dealt with materials that had already been abandoned.[12] *AMC*

12. Moreover, these cases generally involved by-products, which EPA defines as not the "primary products of a production process." 40 C.F.R. § 261.1(c)(3). Some by-products, like the slag at issue in *American Petroleum Institute* and sludge (*AMC II*) can be left on or in the ground or in pits, fermenting and leaching for many months. Because of these characteristics, by-products have been singled out by EPA for their dangerous propensities. *AMC II*, 907 F.2d at 1187.

II addressed sludge pits, *American Petroleum Institute* involved slag piles, and *II CO* dealt with batteries that had been thrown out as garbage by their initial users. In contrast, the bearings here were never abandoned or thrown on the ground. Rather, they were taken directly from the railroads in a self-contained form and sold untreated at competitive market prices as exact substitutes for virgin metals.[13] App. 15-16.

Substantial factual disparities also exist between *Pneumo Abex* and the CERCLA cases relied upon by Site Owners. *See* Petition at 16–18. In *Cadillac Fairview*, the Ninth Circuit stated:

> The rubber companies returned the styrene to Dow only when the styrene became too contaminated for further use in producing rubber. Dow removed the contaminants . . . [and] [r]emoval and release of the hazardous substances was not only the inevitable consequence, but the very purpose of the return of the contaminated styrene to Dow.

41 F.3d at 566. In contrast, here, the Fourth Circuit found no underlying purpose to dispose of the wheel bearings or to otherwise remove contaminants. App. 16. In *Catellus v. United States*, the Ninth Circuit also noted facts not present here: "An inescapable fact is that the leftover battery casings must be disposed of . . . . [Thus,] [t]hey retained their character as waste throughout and would have to be 'gotten rid of.' " 34 F.3d 748, 752 (9th Cir. 1994). In contrast, here, the Fourth Circuit

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13. Site Owners also refer this Court to a case involving lead shot disposed of on the ocean floor of the Long Island Sound. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2d Cir. 1993). Disposing of metals on the bottom of the ocean presents completely different circumstances from Abex's reuse of the worn bearings as raw materials.

explained that "the wheel bearings would be reused in their entirety." App. 16. Given these factual differences, the Fourth Circuit correctly concluded that the sales of the bearings were not a discard of waste.

Site Owners similarly claim that the Fourth Circuit's decision is inconsistent with *A&W Smelter* on the theory that the worn bearings, like the piles of ore and slag at issue in *A&W*, were "no longer usable for a person's principal business." Petition at 17. In reality, the Ninth Circuit's analysis in *A&W Smelter* is consistent with the Fourth Circuit's ruling in all material respects. Like the Fourth Circuit, the Ninth Circuit held that liability under Section 107(a)(3) applied only to a waste and not to a "useful product." 146 F.3d at 1112. Rather than endorsing Site Owners' narrow standard for arranger liability, the Ninth Circuit remanded the case to the district court for fact-finding on factual issues also considered by the Fourth Circuit, including the "commercial reality" of the ore and its "market value, if any." *Id.* at 1113. This decision, which even Site Owners contend was correctly decided, validates the Fourth Circuit's analysis.

Moreover, Site Owners ignore other distinctions that were pivotal to the Ninth Circuit's reasoning. Among other facts, the Ninth Circuit noted: (1) that A&W "attempt[ed] to dispose of the pile in a municipal landfill"; (2) that the ore was contaminated due to the fact that it had been mixed with a discarded, waste by-product, "slag"; and (3) that there was no evidence in the record regarding the market value of the ore. *Id.* Under these facts, the Ninth Circuit may have been justified to suggest that if the ore "was mixed with enough slag so that is was no longer usable for A&W's principal business, then it was waste." *Id.* In contrast, the Fourth Circuit found that: (1) the Railroads and Abex intended the worn bearings to serve as raw materials; (2) no part of the bearings had been discarded;

and (3) that there was considerable evidence that the bearings had great value. App. 15-16. In view of these factual distinctions, similar reasoning would not be appropriate in this case.

Finally, the Ninth Circuit's remand despite the evidence before it rejects the rigid standards for arranger liability and discard proposed by Site Owners. Under Site Owners' proposed standard for arranger liability, any material not useful for its original, intended purpose is subject to arranger liability. Petition at 17. Likewise, according to Site Owners, any secondary material is discarded unless "retained by the generating industry for immediate reuse in a continuous process." Petition at 12. In *A&W Smelter*, however, the ore "had been piling up since the Sixties" and the slag, "a waste product of smelting," had been mixed in with it. 146 F. 3d at 1109. These facts should have been sufficient to find either a discard or an arrangement for treatment or disposal under Site Owners' proposed standards. The Ninth Circuit, however, required additional fact-finding regarding "A&W's actions," the "commercial reality" of the material, and its "market value, if any" before it could determine whether there had been an arrangement for treatment or disposal of the material within the meaning of Section 107(a)(3). *Id.* at 1113. The court's concern for these additional facts shows that the question of whether a discard occurred depends on the totality of the circumstances as the Fourth Circuit also concluded.

C. The Fourth Circuit's Fact-Dependent Ruling Will Not Interfere with EPA's Administration of CERCLA or the SWDA.

1. *The Fourth Circuit's Decision Supports, Rather Than Undermines, Congress' Environmental Regime.*

The Fourth Circuit has previously explained that CERCLA was enacted to "facilitat[e] prompt action to remedy the

environmental blight of unscrupulous waste disposal." *United States v. Monsanto Co.*, 858 F.2d 160, 170 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). Aside from requiring cleanup of existing waste sites, Congress was also concerned with ensuring that the environmental statutes provided appropriate incentives for decreasing the very need for waste disposal, by encouraging environmentally beneficial reuse and recycling.[14] The Sixth Circuit has even cautioned that "we do not wish our interpretation of [CERCLA] to discourage" the "benefits of these agreements such as [ ] reuse and recycling." *Cello-Foil*, 100 F.3d at 1234 n.6.

Had the Fourth Circuit held that liability attached to the Railroads' sale of the reusable bearings, the decision would have posed troubling questions for parties considering reuse and recycling. After all, even Site Owners conceded that the worn bearings were as valuable as and interchangeable with virgin metal ingots. App. 3a. As the Fourth Circuit recognized (and Site Owners also conceded),[15] the pollution from the Foundry would have been identical whether it employed virgin metal or worn bearings. App. 15. The only difference between the worn bearings sold by the Railroads and virgin raw materials was that the bearings had been used before. Because there was no meaningful difference between the virgin and used raw materials, a finding of liability for reused materials and not for virgin materials would have discouraged reuse and recycling while increasing mining activities for virgin metals.

This would undermine the broader goals of Congress by exacerbating the waste disposal problem in the United States. While waste-generation levels from the Foundry would have

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14. *See, e.g.*, S. Rep. No. 96-848, at 71 (1980) (fee system designed to encourage recycling).

15. App. 1a-3a.

been the same with either virgin metals or worn bearings, a greater demand for virgin metals would have produced additional upstream waste generation from mining and primary smelting operations. Such waste generation was avoided by the selection of worn bearings in lieu of virgin metals, thereby also conserving scarce landfill capacity. It would turn Congress' environmental scheme on its head if CERCLA was interpreted in a way that actually encouraged additional waste generation.

2. *The Fourth Circuit's Decision Will Not Undermine EPA's Programs for Protecting the Environment.*

Site Owners argue that the Fourth Circuit's decision will undermine EPA's enforcement of its hazardous waste program and frustrate the implementation of cleanups under CERCLA. These theoretical concerns, however, are premised on two demonstrably false propositions: (i) that the decision by the Fourth Circuit conflicts with EPA's long-standing interpretation of discard as well as relevant case law construing the same term, and (ii) that the Fourth Circuit's decision creates a categorical exemption from arranger liability for all recyclable materials.

The decision will not cause confusion or disarray in the administration of the SWDA or RCRA because it is consistent with EPA's own regulations. As set forth above, EPA has consistently taken the position that secondary materials used as raw materials in the manner of the worn bearings were not discarded. *See supra at* 14-16; 40 C.F.R. § 261.2(e)(1)(i) and (ii). The Fourth Circuit excluded the worn bearings from liability under Section 107(a)(3) for the same reasons that EPA determined that secondary materials like them were not discarded: their utility and functionality as raw materials.

Site Owners also argue that excluding materials like the worn bearings from the scope of arranger liability will lead to

contamination problems at new sites. This contention is premised on the erroneous claim that the Fourth Circuit created a categorical exemption from arranger liability for recycling activities. The Fourth Circuit specifically avoided establishing a bright line, categorical exemption or "loophole" for recycling. Indeed, the Fourth Circuit did nothing more than determine whether the claims brought by the Site Owners exceeded the scope of arranger liability defined by Congress. The court of appeals in no way circumscribed the scope of that liability beyond limitations already recognized by other courts. Rather, it merely identified one factual situation that went beyond what Congress intended to capture under Section 107(a)(3).

Moreover, this is fundamentally an illogical proposition because the contamination problems from the Foundry were not caused by using the worn bearings. Indeed, the pollution from the Foundry would have been no different had Abex used exclusively virgin materials. Site Owners' concerns that the ruling by the Fourth Circuit will somehow change the outcome of future arranger liability cases possessing different facts, such as where the secondary materials actually cause contamination at the site, raise purely hypothetical issues that are not implicated by the decision and which were not before the court of appeals.

Site Owners thus seek certiorari jurisdiction for the purpose of obtaining an advisory opinion about the potential arranger liability of parties in theoretical factual situations. Only recently, this Court reiterated its strong and enduring disapproval of advisory opinions. *See Steel Co., aka Chicago Steel and Pickling Co. v. Citizens for A Better Environment*, 118 S. Ct. 1003, 1016 (1998). The simple fact is that Site Owners have predicated their certiorari petition on these hypothetical concerns because the decision by the Fourth Circuit, as written, does not satisfy this Court's criteria for certiorari review.

CONCLUSION

For the foregoing reasons, the Railroads respectfully pray that the Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM ORAL ARGUMENT BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED JANUARY 27, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Record No.
97-1593

PNEUMO ABEX CORPORATION, et al.,

Plaintiffs-Appellees,

v.

BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC., et al.,

Defendants-Appellants.

ORAL ARGUMENT

(Transcribed from audio cassette)

January 27, 1998

* * *

[23] * * *

THE COURT: The release that occurred from using the used ball bearings was no different than the pollution that would have occurred had you used brand new, if that's a right characterization, raw materials?

MR. HOMSY: Your Honor, if I could correct that impression. In answers to interrogatories, based on information then known, Abex and Whitman did respond that way. Those interrogatories were supplemented after the deposition of Elmer Oates, which became the subject of the record that the Court reviewed, which identified other sources of contamination which related to the process of reclaiming usable metals out of an unusable piece of scrap, Mr. Oates identified several potential sources of lead and other metals at the site, and particularly in the melt-out process as well. And that was different.

[24] THE COURT: He identified potential sources or he identified that in fact these were pollutants which occurred from this reprocessing?

MR. HOMSY: It was part of the reclamation process, Your Honor.

THE COURT: No. I'm asking you, did he identify pollutants that came about from the reprocessing that were different from those which would come about or did come about from using raw materials?

MR. HOMSY: He did. Dirt and grease and oily rags had to be treated or removed in order for that scrap to be converted into a usable product which was sent back to the folks who sent it there in the first place.

THE COURT: You are not contending this case is about the dirt, or grease or oily rags, are you?

MR. HOMSY: No, your Honor.

THE COURT: All right.

* * *

[34] * * *

THE COURT: Let me go down a side road [35] for just a minute. One man's scrap is another man's gold, and this scrap is at least as valuable to the process as raw materials are; is that correct? And yet the raw materials could in no wise be considered scrap by anybody.

MR. HOMSY: That's correct.

THE COURT: I guess that's as far as I want to go.

* * *